SUPREME COURT, U. S.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 1107

BURTON MARKS,

Petitioner,

vs.

THE CHIEF OF POLICE OF THE CITY OF LOS ANGELES and THE CITY OF LOS ANGELES,

Respondents.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM JUDGMENT

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1. According to respondents' Motion to Affirm, the facts in the Court of Appeal's opinion "must be accepted as true, since the Petitioner herein in filing his petition for rehearing before that Court under Rule 28(b) of the Rules on Appeal and [*sic*] adopted by the Judicial Council of the State of

California, never requested a correction of the record to that Court before filing his petition for hearing in the California Supreme Court" (Motion to Affirm at page 2).

While it is not clear which version of Rule 28(b) respondents refer to, it is clear that it is not the Rule 28(b) now in force and in force at the time of the Court of Appeal's decision and at the time the petition for rehearing was filed by petitioner. (Petitioner is informed that there is a new Rule 28(b) proposed by the Court of Appeal which would provide, in essence, that if objections were not made to the statement of facts set forth in the opinion by the Court of Appeal, the facts would be deemed to be true.) The present Rule 28(b) provides that:

> "**(b) [Time for filing petition]** A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of three copies of a printed petition or a petition prepared by other process of duplication in lieu of printing or one copy of a typewritten petition to the clerk of the Court of Appeal which rendered the decision. When such copies are delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of

> Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court."

A brief reading of Rule 28(b) indicates that one of the principal thrusts of the respondent City's argument (an alleged legal presumption of petitioner's agreeing with the facts in the Court of Appeal opinion by his failure to request a correction) is egregious error.

2. It is clear, both from petitioner's moving papers and from the Court of Appeal's decision, that federal, *e.g.*, Constitutional, questions were both raised and considered below. The assertion to the contrary at page 6 of the Motion to Affirm is a misstatement of the record.

Petitioner attacked the imposition of the penalty for his "frivolous" appeal at the earliest point, that is, after the penalty had been imposed, and raised it before the California Supreme Court. That Court's denial of a hearing when such a hearing is sought by a petitioner seeking to have a statute declared unconstitutional is, in effect, a determination that the statute in question is constitutional.

The Court of Appeal *did* consider petitioner's assertion that the "*pari delicto*" reasoning of *Lee On v. Long*, 37 Cal. 2d 499 (1951), worked a forfeiture against petitioner. (Again, the respondent City, in its Motion to Affirm, has misstated the record in this respect, at page 6 of that motion.) The Court of Appeal rejected the argument and, in fact, rejected it to the extent that it deemed it to be "frivolous" and, therefore, the subject of a penalty against the petitioner for having the temerity to raise the argument.

Petitioner sought all available review in the state courts, asserting federal constitutional objections throughout, com-

mencing at the time of trial and through the appellate courts, all of which arguments were rejected by these courts. These objections were timely made, and the rejections were a determination on the merits. Petitioner therefore respectfully submits that this Court has jurisdiction on this appeal and that the questions have substance and should be considered by this Court, and that the Motion to Affirm or Dismiss should be denied.

Respectfully submitted,

MARKS, SHERMAN & LONDON

BY BURTON MARKS

Attorneys for Petitioner

State of California)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on MARCH , 1970, I served the within PETITIONER'S BRIEF IN OPPOSITION TO MOSTION TO AFFIRM JUDGMENT (No. 1107) on the following named parties by depositing the designated copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

COUNTY CLERK, COUNTY OF LOS ANGELES
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012
FOR: HON. ARNOLD PRAEGER, JUDGE of the Superior Court
[1 copy]

CITY ATTORNEY, CITY OF LOS ANGELES
2102 CITY HALL
LOS ANGELES, CALIFORNIA 90012
[2 copies]

THE SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C.
[2 copies]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
217 WEST FIRST STREET
LOS ANGELES, CALIFORNIA 90012
[3 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH , 1970, at HUNTINGTON BEACH, CALIFORNIA.

_____
D. A. Standefer

41 copies to Supreme Court of the United States,
Washington, D. C.